

No. 1-12-3671

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

MICHELLE MONTICELLO,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County
)	
v.)	
)	No. 01 D 11195
MICHAEL MONTICELLO,)	
)	Honorable
Respondent-Appellee.)	Dominique Ross,
)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying petitioner's three petitions for contribution of attorney fees.

¶ 2 Petitioner, Michelle Monticello, now known as Michelle Roberts (Michelle), appeals from an order of the circuit court denying her petitions for attorney fees. Michelle filed the petitions requesting that respondent, Michael Monticello (Michael), pay the attorney fees she incurred in postdecree matters, including child custody litigation and for an earlier appeal. The trial court denied Michelle's petitions finding she had the ability to pay her own attorney fees and

should be responsible for the fees because a substantial portion of the fees were incurred when Michelle was represented by her new husband, attorney Michael Roberts. We affirm the ruling of the circuit court.

¶ 3

BACKGROUND

¶ 4 The parties were married in 1995 and two daughters, Claire and Madeline, were born to the marriage. Michelle filed a petition for dissolution of marriage in 2001. A judgment for dissolution of marriage was entered on June 4, 2002, incorporating a marital settlement and joint custody and parenting agreement. Until 2011, both children resided with Michelle.

¶ 5 The parties filed numerous postdissolution pleadings. On July 30, 2010, the trial court entered an order that increased child support to \$6,600 per month, denied Michelle's request for retroactive child support and denied her request for attorney fees. Thereafter, on August 9, 2010, Michael filed a motion to modify child support and for other relief. On August 26, 2010, Michael filed a notice of appeal seeking reversal of the court's July 30, 2010 order increasing child support payments. Michelle filed a cross-appeal seeking a reversal of the trial court's denial of a retroactive increase in child support payments and her petition for attorney fees.

¶ 6 After Michael filed the August 9, 2010, petition for modification of child support, Michelle retained her new husband, Michael Roberts (Roberts) to represent her in postdecree support matters. She subsequently retained Roberts and John Lally (Lally) to represent her in the defense of the appeal filed by Michael, as well as in her cross-appeal for retroactive child support and attorney fees. On November 15, 2010, Michelle filed a petition for interim and prospective attorney fees and costs for Roberts in the postdecree support matters (Petition I) and a petition for

interim and prospective appellate attorney fees for Roberts and Lally (Petition II).

¶ 7 After Michael filed an emergency petition seeking temporary custody of Claire in January 2011, Roberts withdrew his appearance and Michelle retained Matthew Kirsch to represent her. Over the course of the next several months, Michelle and Michael litigated the custody of Claire. During this time, the circuit court appointed a child representative.

¶ 8 On July 11, 2011, Michelle filed a petition for interim attorney fees for Kirsch (Petition III). On August 9, 2011, the parties settled the custody matter and modified the joint parenting agreement. The parties agreed that Claire would reside with Michael on a full time basis.

¶ 9 On December 7, 2011, this court affirmed in part and reversed in part the trial court's July 30, 2010 order. *In re Marriage of Monticello*, 2011 IL App (1st) 102575-U. We affirmed the increase in Michael's child support payments to \$6,600 per month and the denial of Michelle's prior petition for attorney fees. *Id.* However, we reversed the trial court's July 30, 2010 order in part, finding that the increased child support award should have been retroactive to when Michael had notice of Michelle's petition to increase the support. *Id.* Because Michelle was successful in part on her cross-appeal, she contends she should be awarded attorney fees for her cross-appeal.

¶ 10 On May 24, 2012, the trial on Michelle's three petitions for attorney fees commenced. Petition I, as amended, requested contribution to attorney fees and costs for Roberts in the amount of \$6,562.50. Petition II, as amended, requested interim and prospective appellate attorney fees for Roberts and Lally, who represented her on the prior appeal, in the amount of \$15,816.26. Petition III requested interim fees owed to Kirsch in the amount of \$24,317. The amounts sought by Michelle are not in dispute in this appeal.

¶ 11 In all three petitions, Michelle argued that she lacked the financial resources to pay the fees owed to her attorneys. Michelle argued that because Michael's annual salary was significantly more than her salary and he possessed greater assets, he was able to pay or contribute towards her attorney fees. She argued that her annual gross income was approximately \$25,000, whereas Michael's annual gross income was in excess of \$400,000. Michelle attached affidavits to her petitions attesting to the amounts owed and her inability to pay the fees incurred. She also attached affidavits from her attorneys attesting to the engagement of their legal services, the work performed or to be performed and the legal fees incurred and due.

¶ 12 At the hearing, John Lally, co-counsel on the 2010 appeal, testified that he entered into an engagement agreement with Michelle. He received no retainer and no payment for his services. The total amount incurred for his representation was \$9,400. He also testified that he was "helping with the Roberts appeal" as a "personal friend" of Roberts. When asked if he would pursue Michelle for the monies owed if Michael was not ordered to contribute to the balance he responded, "[y]eah. I think I'm owed something. *** I plan to ask her for \$9,400."

¶ 13 Matt Kirsh, Michelle's counsel in the custody dispute, testified that he began representing Michelle in March, 2011. She entered into an engagement agreement with Kirsh at one firm and then later at his new firm. He received an initial retainer of \$2,500 and a subsequent payment of \$2,500 in June, 2012. He billed Michelle on a monthly basis and testified that the amount owed at the time of the hearing was \$23,684.50, although his billing statements indicated an addition of \$4,655 owed to his new firm, for a total unpaid balance of \$28,684.50.

¶ 14 Kirsh was approached by Roberts about representing Michelle. Kirsh agreed with

Michelle that "to the extent Mike Monticello is not ordered to contribute, she will pay [Kirsh's] fees." He testified that he would not normally take a \$2,500 retainer for this type of case, but did so because Roberts is his colleague. He did not specifically inform Michelle that the balance on her account had increased significantly over time and that she needed to make a payment. He also stated that his former firm accepted credit card payments.

¶ 15 Roberts testified that he entered into an agreement to represent Michelle on the financial aspect of the postdecree litigation. He also represented Michelle in the 2010 appeal. He charged fees to Michelle for the postdecree representation from August 3, 2010 to January 2011, in the amount of \$6,562.52. In early 2011, when the nature of the postdecree proceedings became largely a custody dispute, he withdrew and he hired Kirsch to represent Michelle in the custody matter. After the denial of her prior fee petition was affirmed on appeal, Michelle paid Roberts \$15,500 for his representation between 2007 and 2009. This money came from their joint money market account. This account was originally Roberts' nonmarital money. Once the custody matter was settled, he filed a new appearance. In 2012, he charged Michelle fees of \$5,108.25 for his representation. As co-counsel for the 2010 appeal, he accrued fees in the amount of \$6,125 and \$291.26 in costs. He periodically sent billing statements to Michelle and has not been paid for work performed after August, 2010. His law office does not accept credit card payments. He has not demanded payment from Michelle, nor has he imposed a supplemental \$25 charge per month for outstanding bills as provided in the engagement agreement. The total amount owed was \$18,087.03.

¶ 16 Michelle testified that she lives with her husband, Roberts, their son and her youngest

daughter Madeline. She works part time at St. Andrew's School and earns approximately \$25,000 per year. Michelle testified to the amounts listed on her Rule 13.3.1(a) disclosure statement. In 2011, she and Roberts had an adjusted gross income of \$79,926 and \$1.00 in interest income. Their adjusted gross income for 2010 was \$92,847. She has a personal checking account and a separate joint checking account with Roberts. Roberts makes all the deposits into the joint checking account which is used for household expenses and mortgage payments. The personal account is where she receives child support payments. She uses the personal account to pay her credit card bills. She never transfers money between the joint household account and her separate personal account. She has a joint money market account with her husband with a balance of \$15,000. She has two retirement accounts totaling \$13,100. Her disclosure statement shows that she holds approximately \$21,000 in credit card debt. She testified that between 2007 and 2010 her credit card debt exceeded \$50,000. The credit card debt she accrued was from a time when she was receiving less child support and when both Claire and Madeline resided with her. When the trial court increased the child support payments in 2010, she began to pay down her credit card debt.

¶ 17 She hired Roberts to represent her in the postdecree matters involving financial issues. She retained Kirsh for the child custody dispute and Lally for the appeal. Both Kirsh and Lally were recommended by her husband. She paid \$15,000 from the joint marital money market account to pay Roberts' legal fees from 2007-2009, \$5,000 to Kirsh and \$1,250 in fees to Jean Conde, the child representative. She authenticated the engagement agreements presented to the court. She testified that nothing in any of the engagement agreements provide that she is not

obligated to pay her attorneys.

¶ 18 On cross-examination, Michelle testified that the Rule 13.3.1(a) disclosure does not include 100% of her household income. She stated that her husband maintains other nonmarital financial accounts. Certain expenses, like his car, are not paid from the household account but rather from his separate account. She testified that certain expenses listed on the disclosure statements are no longer correct, *e.g.*, the Irish dancing costs, the amount listed for gas and car payment for her husband's vehicle. Michelle testified that she does not have the ability to pay her attorneys. She testified that her credit card debt between 2007 and 2010 sometimes exceeded \$50,000, however, after the court increased her child support payments to \$6,600 in August, 2010, she was able to reduce her credit card balance to approximately \$21,000. She testified that the available credit on her credit card accounts exceeds \$65,000. She receives regular bills from her attorneys and from the credit cards. She did not pay Kirsh or any of her attorneys using her credit cards, nor has she used the money available in the money market account to pay the attorneys.

¶ 19 Michael lives with his wife, their young son and his eldest daughter Claire. He testified to the amounts listed on his Rule 13.3.1(a) disclosure statement. He stated that his salary varies due to bonuses over which he has no control. His base salary at the time of the hearing was \$245,000. He received \$435,014 in compensation plus an employer contribution to his 401(k) plan of \$16,500 for 2011. The adjusted gross income for his household in 2011 was \$560,906. He has been billed \$46,000 by his attorneys since August 1, 2010, and his appellate attorney's fees totaled \$12,896. He testified that he pays approximately \$2,400 in child support for Madeline

who resides with Michelle. He pays the entire \$15,000 tuition for Claire and half of the tuition for Madeline. He paid \$45,000 to Michelle in May 2012, as part of the custody settlement. The lump sum payment was a settled amount including child support arrearage and medical bills. In the settlement, he also received credits for the time where he was paying \$5,000 per month in child support to Michelle while only Madeline was living with her.

¶ 20 Jean Conde, the court-appointed child representative, testified as to the amounts due for her services. On October 15, 2012, Conde filed a motion for allocation of child representative's fees. Conde sought a balance owed of \$6,353.92. In her motion, she asserted that Michael had paid her a total amount of \$6,378.13 and Michelle had paid a total amount of \$1,286.70.

¶ 21 The trial court issued two orders following the hearing. The first order was entered on September 28, 2012, disposing of Michelle's fee petitions. The circuit court found:

"[t]his matter comes before the court post decree, Judgment for Dissolution of Marriage having been entered June 4, 2002. Petitioner is seeking contribution to attorney's fees and costs pursuant to Sections 508(a), 503(g) and 503(j) of the Illinois Marriage and Dissolution of Marriage Act. The court has heard sufficient evidence to determine that each party has the ability to pay his or her own attorney's fees. While the court recognized that Respondent earns significantly more [income] than Petitioner, Petitioner has failed to show that she has the inability to pay her own attorney's fees. Additionally, a substantial portion of the attorney's fees for which the Petitioner is seeking contribution, Petitioner was represented, in part, by her husband and the court finds that she should be responsible for her own fees. Based on the entire record and the reasons set forth herein, Petitioner's

Petition's for Contribution to Attorney's Fees and Appellate Attorney's Fees is denied."

After the September 28, 2012 order was issued, the parties, by agreement, advised the trial court that it failed to address the unpaid child representative fees. Thereafter, Conde submitted her October 15 motion to allocate her fees. The trial court then entered the November 15, 2012, order for Michael to pay all the outstanding fees due to the child representative.

¶ 22 Michelle filed her notice of appeal on December 7, 2012, requesting we reverse the September 28, 2012, order denying her petitions for attorney fees and remand for the assessment of fees and costs. Michael does not cross-appeal.

¶ 23 Initially we note that Michael filed a motion to involuntarily dismiss this appeal under Illinois Supreme Court Rule 303 (eff. May 30, 2008)), arguing this court lacks jurisdiction because the notice of appeal was filed more than 30 days after the trial court denied Michelle's fee petitions on September 28, 2012. Michelle argues the notice of appeal was timely filed because the order disposing of the child representative's claim was entered on November 15, 2012, and this date is the operable date for notice of appeal purposes. This court denied the motion to dismiss on January 18, 2013. Michael filed a motion to reconsider which was also denied. Even though another panel of this court denied the motion to dismiss, we still have the obligation to address jurisdiction. *Williams v. BNSF Ry. Co.*, 2013 IL App (1st) 121901, ¶ 5. The motion for allocation of the child representative's fees was presented during the trial on Michelle's fee petitions, by agreement of the parties. The child representatives claim, therefore, remained pending after the issuance of the September 28, 2012 order on Michelle's fee petitions. Because the representative's claim was unresolved at that time, the time for filing Michelle's

notice of appeal did not begin to run until the trial court disposed of the representative's motion on November 15, 2012. Ill. S. Ct. R. 304 (eff. Jan. 1, 2006) (without a rule 304(a) finding "any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable."). Therefore, this court has jurisdiction to consider this appeal.

¶ 24

ANALYSIS

¶ 25 Michelle contends the trial court abused its discretion when it denied her request for Michael to pay her attorney fees. She maintains that she is unable to pay the attorney fees and that Michael clearly has the ability to pay those fees.

¶ 26 Generally, attorney fees are the responsibility of the person for whom the services were rendered. *In re Marriage of Wolf*, 80 Ill. App. 3d 998, 1009 (1989). However, the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508 (West 2010)) gives the trial court the discretion to order one spouse to pay all or contribute in part to the other spouse's attorney fees, after considering the parties' financial resources. *In re Marriage of Minear*, 181 Ill. 2d 552, 561-62 (1998).

¶ 27 We review a trial court's order regarding attorney fees in postdissolution proceedings for an abuse of discretion. *Posey v. Tate*, 275 Ill. App. 3d 822, 829 (1995). Whether one spouse's attorney fees should be awarded and in what proportion is a decision within the discretion of the trial court and will not be disturbed on review absent an abuse of that discretion. *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 976 (1997). An abuse of discretion occurs "when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the

view adopted by the trial court." (Internal quotation marks omitted.) *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 28 Michelle brought Petitions I and II pursuant to sections 501(c-1), 503(g) and 508(a) of the Act and Petition III pursuant to section 508(a). However, the only statutory basis for fees argued in her appeal brief is section 508 of the Act. We consider her arguments in light of section 508 of the Act.

¶ 29 Section 508 provides that:

"(a) The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection." 750 ILCS 5/508 (West 2010).

Fee awards under section 508 can be made in connection with certain proceedings including:

- "(1) The maintenance or defense of any proceeding under this Act.
- (2) The enforcement or modification of any order or judgment under this Act.
- (3) The defense of an appeal of any order or judgement under the Act, including the defense of appeals of post-judgment orders.
- (3.1) The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed)." 750 ILCS 5/508(a) (West 2010).

The Act "has been construed to authorize prospective fee awards in appropriate circumstances,

but such awards should be made cautiously." *In re Marriage of Savas*, 139 Ill. App. 3d 68, 81 (1985).

¶ 30 Attorney fees may be awarded by a trial court when the spouse seeking relief establishes: (1) the financial inability to pay the fees; and (2) the ability of the other spouse to pay. *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 832 (1992). "Financial inability exists when payment would strip a party of his or her means of support and would undermine his or her economic stability, but it does not require the party to show destitution." *Id.* A mere showing that the other spouse has a greater ability to pay attorney fees is not sufficient to justify an award. *In re Marriage of Bean*, 181 Ill. App. 3d 671, 675 (1989).

¶ 31 Michelle is seeking \$53,248.25 in attorney fees and alleges that her inability to pay the attorney fees is a result of the fact that she has less income than Michael, has credit card debt, and would have to use her assets to pay the fees. The record demonstrates that Michael's annual base salary at the time of the hearing was \$245,000. In addition, he received a discretionary annual bonus from his employer. Michelle testified that her individual annual income was \$25,000; she held several bank accounts, individually and jointly with Roberts; she had credit card credit lines exceeding \$65,000.

¶ 32 Michelle cites numerous cases in support of her position that a disparity of income between spouses supports an attorney fee award to the party with the lesser income. While we are mindful that numerous cases have found that a significant disparity in income and assets is a significant factor in determining whether to award attorney fees, the greater ability of the opposing spouse to pay the petitioner's attorney fees does not necessarily mean that the petitioner

has an inability to pay her own attorney fees. *In re Marriage of Stockton*, 169 Ill. App. 3d 318, 328 (1988) (although the parties' income greatly differed, petitioner did not show she was unable to pay even where she made far less income than spouse and worked only part time); *In re Marriage of Imes*, 52 Ill. App. 3d 792, 797 (1977) (greater ability to pay by opposing spouse does not equate to inability of petitioning spouse to pay attorney fees where the petitioning spouse made less income and had a minimal amount of savings and the opposing spouse had a higher income and more significant assets). Even in circumstances similar to the case *sub judice* where the petitioning spouse had regular income and/or assets available from which to make payments towards the fees, we have ruled the petitioning spouse did not establish an inability to pay. *In re Bauer*, 138 Ill. App. 3d 379, 93 (1985) (spouse could not carry her burden of showing financial inability to pay her attorney fees where she was able to earn future income and received a cash award from the division of marital assets); *In re Marriage of Adams*, 348 Ill. App. 3d 340, 345 (2004) (spouse who had a savings account balance and other financial assets had the ability to pay her own attorney fees).

¶ 33 In the present case, the circuit court concluded Michelle had the ability to pay her attorney fees after reviewing the parties' financial disclosure statements, viewing the fee petitions and considering the testimony of the witnesses. We agree with the court's assessment. Although Michael's yearly income is greater than Michelle's, Michelle did not demonstrate an inability to pay.

¶ 34 Michelle testified that she has various financial assets in addition to her salary. She testified that she had several bank accounts, held individually and jointly with Roberts, in which

she had access to approximately \$20,000. She also had available credit lines exceeding \$65,000 on her credit cards as of May 2012. Michelle testified that her current husband pays the household expenses. She also testified that certain monthly expenses listed on her disclosure form were actually borne by her husband and paid entirely from his separate accounts; and certain other expenses listed she no longer incurs. The trial court was within its discretion in finding that Michelle did not demonstrate that her payment of her attorney fees would strip her of her means of support or undermine her financial stability. *In re Marriage of Bentivenga*, 109 Ill. App. 3d 967, 975 (1982). Considering all of the relevant factors contained in the record, we conclude that the trial court did not abuse its discretion in denying Michelle's petitions for attorney fees.

¶ 35 Next, Michelle argues that the trial court's ruling that she has the ability to pay her own attorney fees is in conflict with the trial court's later ruling requiring Michael to pay the monies owed on Michelle's behalf to the court appointed child representative. Michelle argues that the analysis required for allocating Conde's fees is the same as the analysis for contribution to Michelle's attorney fees and, therefore, the two orders should be consistent. We are not persuaded.

¶ 36 The record discloses that Conde's total fee was \$14,018.75. Michael had paid \$6,378.13 and Michelle had paid \$1,286.70, leaving an unpaid balance of \$6,353.92. Conde requested the court to allocate the balance due between the parties. The parties did not respond at the hearings to her testimony. The circuit court's order requiring Michael to pay the remainder of Conde's fees does not include the reasoning for the court's decision. The record does not inform us of the

analysis employed by the circuit court or the evidence relied upon in coming to the decision that Michael pay the full amount of the unpaid fees due to Conde.

¶ 37 It is the appellant's burden to provide this court with a sufficiently complete record of the trial court proceedings to support her claim, and any doubts due to the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We cannot ascertain from the record before us the court's reasoning for ordering Michael to pay the remainder of Conde's fees. The trial court was well aware that significant monies were at issue and its decision to order Michael to pay the full amount of the child representative fee does not warrant a conclusion that he therefore should have been ordered to pay all or a portion of the fees Michelle requested. Therefore, we find no error by the trial court in this regard.

¶ 38 Lastly, Michelle argues that Roberts is entitled to an award of attorney fees regardless of the fact that he represented his wife. She analogizes her position to *In re Marriage of Brockett*, 130 Ill. App. 3d 499 (1984) where we found it was error to deny an award of attorney fees to a legal service agency that did not expect payment from the petitioner. The record shows that there was a dispute between the parties as to whether Roberts credibly expected to be paid his fees from Michelle and whether the court could and should require Michael to pay Roberts' fees.

¶ 39 In denying Michelle's petitions the trial court, in its written order, observed that Michelle "failed to show that she has the inability to pay her own attorney's fees. Additionally, a substantial portion of the attorney's fees for which the Petitioner is seeking contribution, Petitioner was represented, in part, by her husband and the court finds that she should be responsible for her own fees." Although not directly argued, it appears Michelle contends she did

not prevail because one of her lawyers was her husband and the trial court concluded he should work for free. We do not agree with this cynical conclusion. In context, this single observation also indicates the trial court was making factual and credibility determinations as to whether Roberts expected payment from his wife. This remark does not convey the notion that the Court did not believe Roberts should not be paid. At best it indicates that any payment due Roberts should come entirely from Michelle and not from Michael. Without more than this brief statement, we cannot conclude that the trial court denied her petitions as it related to Robert's fees because he was Michelle's husband. The record more persuasively supports the conclusion that Michelle failed to prove her entitlement to contribution from Michael for her attorney fees based on the legal principals set forth above.

¶ 40

CONCLUSION

¶ 41 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.